STATE OF MICHIGAN

COURT OF APPEALS

In re GARCIA-CAMPBELL, Minors.

UNPUBLISHED
February 10, 2015

No. 323308
Wayne Circuit Court
Family Division
LC No. 14-516411-NA

Before: CAVANAGH, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Respondent S. Campbell appeals as of right the circuit court's order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (g), (j), and (k)(*ii*). We affirm the trial court's determination regarding the existence of at least one statutory ground for termination, but vacate its decision regarding the children's best interests and remand for further proceedings.

Respondent's parental rights were terminated primarily because he sexually abused one of the minor children. Respondent also sexually abused JM, one of the minor children's friends, for which he pleaded guilty to four counts of third-degree criminal sexual conduct (CSC) and one count of contributing to the delinquency of a minor.

We first address respondent's argument that JM's statements to a police detective regarding respondent's sexual abuse of her were inadmissible hearsay. Because respondent did not object to the challenged testimony at trial, this issue is unpreserved. MRE 103(a)(1). We review an unpreserved evidentiary issue for plain error affecting respondent's substantial rights. MRE 103(d); *Wolford v Duncan*, 279 Mich App 631, 637; 760 NW2d 253 (2008).

Legally admissible evidence was required to terminate respondent's parental rights at the initial dispositional hearing. MCR 3.977(E); *In re Utrera*, 281 Mich App 1, 16-17; 761 NW2d 253 (2008). Hearsay "is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a). Hearsay is generally inadmissible unless the rules of evidence provide otherwise. MRE 802. A statement made by someone other than the declarant while testifying is not hearsay if it is offered for a purpose other than the truth of its contents. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 540; 775 NW2d 857 (2009).

Respondent takes issue with a detective's testimony that JM alleged that she engaged in various types of sexual activity with respondent. JM's statements regarding respondent's conduct were out-of-court assertions made by someone other than the declarant while testifying. However, it is not clear that the statements were offered to prove the truth of the matters asserted, i.e., that respondent engaged in oral sex and intercourse with JM 15 to 20 times. Rather, the statements provided context for respondent's statement to the detective when respondent was asked about JM's allegations. "Statements offered to show that they were made or to show their effect on the listener are not hearsay." *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998), abrogated in part on other grounds by *Molloy v Molloy*, 247 Mich App 348, 349-350; 637 NW2d 803 (2001), vacated in part 466 Mich 852 (2002). Thus, there was no plain error.

Even if the challenged testimony could be considered plain error, however, it did not affect respondent's substantial rights. Although respondent attempted to minimize his responsibility, he did admit to engaging in an act of sexual penetration with JM. He said he recalled his mouth being on JM's vagina and sexual penetration by definition includes cunnilingus. MCL 750.520a(r). Further, the record of respondent's criminal convictions was evidence that he engaged in acts of sexual penetration with a minor; he pleaded guilty to third-degree CSC under MCL 750.520d(1)(a), which consists of engaging in sexual penetration with a person between the ages of 13 and 16. Therefore, regardless of anything JM said, the trial court had legally admissible evidence to show that respondent had engaged in acts of sexual penetration with another minor.

We next address respondent's argument that the trial court erred in finding that the statutory grounds for termination were established by clear and convincing evidence. We review the trial court's findings regarding the statutory grounds for termination for clear error. MCR 3.977(K); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The trial court did not clearly err in finding that §§ 19b(3)(b)(*i*) and (j) were both established by clear and convincing legally admissible evidence with respect to all of the children, or in finding that § 19b(3)(b)(g) was established by clear and convincing evidence with respect to his daughter, CMG. Respondent admitted placing his hand down his daughter's pants and touching her vagina. This admission showed that respondent sexually abused the victim, a sibling of the other children. In addition to sexually abusing the victim, respondent sexually abused JM and he subsequently pleaded guilty to third-degree CSC. Although respondent attempted to minimize his culpability by claiming that he made a mistake, that his actions were prompted by drug abuse, or that he could not recall what he had done, the evidence of the repeated nature of the sexual activity showed that it was reasonably likely that any child placed in respondent's custody would be abused. Accordingly, the evidence supports the trial court's determination that grounds for termination were established under §§ 19b(3)(b)(*i*) and (j).

The evidence that respondent sexually abused his daughter CMG also showed that he failed to provide proper care and custody, and the evidence that respondent had willingly preyed upon his daughter and had also repeatedly sexually abused another underage teen showed that he could not reasonably be expected to provide proper care and custody within a reasonable time. Accordingly, termination of respondent's parental rights to CMG under § 19b(3)(g) was also supported by clear and convincing evidence.

We agree that the trial court erred to the extent that it also applied §§ 19b(3)(b)(*ii*) and (k)(*ii*) to respondent. Subsection 19b(3)(b)(*ii*) "is intended to address the parent who, while not the abuser, failed to protect the child from the other parent or non-parent adult who is an abuser." *In re LaFrance*, 306 Mich App 713; ___ NW2d ___ (2014), slip op at 7. The evidence showed that respondent sexually abused his daughter. There was no evidence that some other person abused the child and that respondent failed to protect the child from such abuse. With respect to § 19b(3)(k)(*ii*), there was clear and convincing evidence that respondent engaged in criminal sexual conduct involving penetration with JM, but she is not his child or a sibling of his children. Although there was also evidence that respondent engaged in criminal sexual conduct with his daughter, the testimony indicated that respondent touched his daughter's vagina. The testimony did not clearly describe an act of penetration. But because only one statutory ground need be proven, *In re Frey*, 297 Mich App 242, 244; 824 NW2d 569 (2012), and because the trial court did not clearly err in finding that §§ 19b(3)(b)(*i*), (g), and (j) were all established, any error with respect to §§ 19b(3)(b)(*ii*) and (k)(*ii*) was harmless. See *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

Respondent lastly argues that the trial court erred in finding that termination of his parental rights was in the children's best interests. Even if the trial court finds a statutory basis for termination of parental rights, it cannot order termination unless it finds by a preponderance of the evidence that termination is in each child's best interests. MCL 712A.19b(5); *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013); *In re Olive/Metts*, 297 Mich App 35, 42; 823 NW2d 144 (2012). Although we do not disagree with the trial court's conclusion that the need to protect the children weighed in favor of termination, the record indicates that the children had been placed with a relative, which is a factor that weighs against termination. *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010). A child's relative placement is a factor that must be explicitly addressed by the trial court. Its failure to do so "renders the factual record inadequate to make a best interests determination and requires reversal." *In re Olive/Metts*, 297 Mich App at 43. The trial court found that termination of respondent's parental rights was in the children's best interests based on the referee's written report and recommendation. Although the referee noted the children's relative placement in her ruling from the bench, she did not note or discuss it in her written report and recommendation. Thus, there is no basis for concluding that the trial court was aware of and considered the children's relative placement. Accordingly, we vacate the trial court's best-interest determination and remand for reconsideration of that issue.

In sum, we affirm the trial court's determination that statutory grounds for termination were established under §§ 19b(3)(b)(*i*), (g), and (j), but vacate the trial court's best-interest decision and remand for reconsideration of that issue in light of the children's relative placement.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro